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May 1, 2007

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW Room TW-A325
Washington, D.C. 20554

Dear Secretary Dortch and Commission Members:

Pursuant to the notice published by the Federal Communications Commission on March 2, 2007, and the FCC Order filed March 21, 2007, extending the time for the submission of comments in this proceeding through May 2, 2007, the American Bar Association (ABA) submits the following comments in support of the *Alternative Rulemaking Proposal Related to Inmate Calling Services* submitted by *Martha Wright, et al.* (Petitioners) on March 1, 2007, CC Docket No. 96-128, DA 03-4027. As required by the Commission Rulemaking Notice, we have also delivered copies of these comments to Lynne Hewitt Engledow, Pricing Policy Division, Federal Communications Commission, and to Best Copy and Printing, Inc., the Commission's copy contractor.

Description and Mission of the American Bar Association

The ABA is the largest voluntary professional association in the world. With more than 400,000 members, the ABA provides law school accreditation, continuing

legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public.

The Mission of the American Bar Association is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.

Statement of Interest

For over twenty-five years, the ABA steadfastly has maintained that any limitations placed on “prisoners’ communications should be the least restrictive necessary to serve the legitimate interests of institutional order and security and the protection of the public.”¹ Indeed, as recently as 2005, the ABA House of Delegates voted unanimously to adopt a resolution which provides:

RESOLVED, That the American Bar Association encourages federal, state, territorial and local governments, consistent with sound correctional management, law enforcement and national security principles, to afford prison and jail inmates reasonable opportunity to maintain telephonic communication with the free community, and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates.

The subject presented in the Alternative *Wright* Petition, and the broader issues implicated in these proceedings are directly related to ABA policy and have a potentially adverse impact on pretrial detainees and prisoners across the country, as well as their families.

Comments of the American Bar Association Regarding the Alternative *Wright* Petition

¹ *ABA Standards for Criminal Justice, Legal Status of Prisoners*, Standard 23-6.1. (a) (1981)(communication rights).

Telephone communication is especially important in the justice system, where many attorneys have little practical choice but to communicate with clients by telephone, especially where distance, literacy, or linguistic barriers preclude other kinds of client communication.²

The core problem is that excessive rates are imposed by service providers who compete for exclusive telephone service contracts on the basis of “commissions” paid to correctional systems and facilities. These “commissions,” ranging between 30 and 65% of total revenue, drive ever-increasing rates, making telephone communication unjustifiably expensive.

Various studies, correctional agencies, and professional organizations have concluded that the maintenance of ties between a prisoner and the family are key to a successful transition into the community after release from prison, and that telephones are essential to the realization of that objective.³ Correctional

² Approximately 40% of the national prison population is functionally illiterate. The Center on Crime, Communities & Culture, *Education as Crime Prevention: Providing Education to Prisoners*, Research Brief: Occasional Paper Series 2 (Sept. 1997).

³ See, e.g., the October 1996 Resolution on Excessive Phone Tariffs adopted by the American Correctional Association (ACA); ACA’s Public Correctional Policy on Inmate/Juvenile Offender Access to Telephone (adopted 24 January 2001); and ACA’s related standards (*Standards for Adult Correctional Institutions* (3rd ed.); *Standards for Adult Local Detention Facilities* (3rd ed.); *Standards for Adult Community Residential Facilities* (4th ed.); *Standards for Adult Correctional Boot Camp Programs* (1st ed.); *Standards for Juvenile Community Residential Facilities* (3rd ed.); *Standards for Juvenile Detention Facilities* (3rd ed.); *Standards for Juvenile Correctional Boot Camp Programs* (1st ed.); *Standards for Juvenile Training Schools* (3rd ed.); *Standards for Small Juvenile Detention Facilities* (1st ed.); and *Small Jail Facilities* (1st ed.)). See also, the National Sheriffs’ Association Resolution of 14 June 1995; and USDOJ-BOP, Program Statement 5264.06, *Telephone Regulations for Inmates* (Jan. 31, 2002); and the report of the Vera Institute of Justice-sponsored Commission on Safety & Abuse In America’s Prisons, “*Confronting Confinement*,” pp. 36, 39, *passim* (June 2006).

professionals also appreciate the value of telephone privileges as a mechanism to encourage prisoner compliance with institutional rules of conduct.⁴

Access to a broad range of reasonably priced telephone services is key to the ability of an inmate and the inmate's family to communicate by telephone. Although alternate pricing plans are common outside the correctional setting (including pre-paid calling, toll-free calling, and debit calling), most correctional facilities and agencies permit only collect calls – the most costly of all telephone services.

Regrettably, the cost of these calls fall on the family, friends and attorneys of incarcerated people. Many of these families make difficult financial choices in order to pay exorbitant rates. Perhaps the most damaging consequence for families, and especially for children, occur when they are unable to maintain contact with parents who are confined.

There also are serious implications for prisoners awaiting trial or otherwise seeking access to the courts.⁵ The vast majority of incarcerated people are represented by publicly funded lawyers such as public defenders, court-appointed attorneys, or nonprofit providers of legal services to prisoners. It is generally less burdensome for an attorney to speak with a client over the telephone than to travel to a correctional facility to conduct a personal interview, especially where distance, literacy, or linguistic barriers preclude other kinds of client communication. Given the limited budgets provided for prisoner representation, the high cost of prisoner

⁴ See, e.g., Texas Dept. of Criminal Justice, Offender Orientation Handbook, § J. Telephone Calls (2004) (“It is the policy of the TDCJ to allow eligible offenders to make telephone calls. An offender’s use of the telephone is an earned privilege based on a good conduct and work record. . . .”) <http://www.tdcj.state.tx.us/publications/cid/OffendOrientHbkNov04.pdf> (last accessed 12 April 2007)

⁵ See, e.g., *Lewis v. Casey*, 518 U.S. 343, 355 (1996) (prisoners are entitled to court access “to attack their sentences, directly or collaterally, and . . . to challenge the conditions of their confinement. . . .”)

phone calls limits the amount of contact with a client behind bars for many lawyers. Of course, this has significant implications for the quality of justice and a prisoner's ability to gain access to the courts.⁶

Representative Bobby L. Rush recently introduced "The Family Telephone Connection Protection Act", H.R. 555 in the U.S. House of Representatives. The legislation would amend the Communications Act of 1934 to require the Federal Communications Commission to consider, *inter alia*, prescribing prisoner telephone rates. By letter dated January 31, 2006, the ABA wrote Representative Rush to express its strong support for identical legislation introduced in the previous Congress and to urge members of the House of Representatives "to support this legislation so that it may soon become law." The FCC need not await enactment of this legislation because it is fully authorized to resolve this matter under Section 201(b) of the Communications Act, requiring interstate rates to be "just and reasonable" and authorizing the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out" this requirement.

⁶ Courts have long recognized that the ability to communicate privately with an attorney by telephone is essential to the exercise of the constitutional rights to counsel and to access to the courts. *Murphy v. Waller*, 51 F.3d 714, 718 & n.7 (7th Cir. 1995)("Restrictions on a detainee's telephone privileges that prevented him from contacting his attorney violate the Sixth Amendment right to counsel. . . . In certain limited circumstances, unreasonable restrictions on a detainee's access to a telephone may also violate the Fourteenth Amendment."); *Tucker v. Randall*, 948 F.2d 388, 390-91 (7th Cir. 1991)(denying a pre-trial detainee telephone access to his lawyer for four days would implicate the Sixth Amendment); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir.1989)(holding that inmates' challenge to restrictions on the number and time of telephone calls stated a claim for violation of their rights to counsel); *Miller v. Carlson*, 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd & modified on other grounds*, 563 F.2d 741 (5th Cir. 1977)(granting a permanent injunction precluding the monitoring and denial of inmates' telephone calls to their attorneys). Courts have also held that, when a prison's collect call-only policies interfere with the ability of incarcerated people to communicate with their lawyers, correctional officials may be in violation of the Constitution). *See, e.g., In re Ron Grimes*, 208 Cal. App. 3d 1175, 1178 (1989)(holding that switch by Humboldt County (California) Jail from coin operated to collect-only calls violated the constitutional rights of people incarcerated there because the public defender's office, other county departments, and some private attorneys did not accept collect calls).

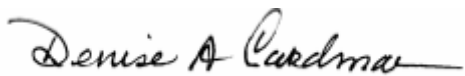
CONCLUSION

Contracts for telephone services in a correctional setting are negotiated between correctional facilities or entire correctional systems and the carrier. These contracts are exclusive and provide the correctional facilities sources of substantial revenue through “commissions” on the gross revenue for all calls. Generally, only collect calls are permitted (the most expensive billing mechanism). Often the parties seek no input from prisoners, nor give any consideration to the interests of those who will receive and pay for the calls. If the call is accepted, the recipient has no choice but to accept the terms agreed upon by the correctional facility and the carrier.

The Alternative *Wright* Petition gives the FCC the opportunity to take meaningful action to address excessive inmate phone service rates and ensure the broadest possible range of calling options.

The American Bar Association urges the FCC to resolve this matter at a minimum, by ensuring reasonable long distance rates for inmate-initiated calls and facilitating new calling options as requested in the Alternative *Wright* Petition.

Respectfully submitted,

A handwritten signature in black ink, reading "Denise A Cardman". The signature is written in a cursive, flowing style.

Denise A. Cardman